No. 3969

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW JERSEY INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

C. W. YOUNG,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record.

GEORGE F. SHELTON, Esq., of Butte, Montana,
EARLE N. GENZBERGER, Esq., of Butte, Montana,
JAS. W. FREEMAN, Esq., of Great Falls, Montana,

Attorneys for Defendant and Plaintiff in Error.

Messrs, NOLAN & DONOVAN, of Butte, Montana,
J. P. DONNELLY, Esq., of Havre, Montana,

Attorneys for Plaintiff and Defendant in Error. [1*]

In the District Court of the United States in and for the District of Montana.

No. 1053.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on April 24, 1922, a transcript on removal of said cause from the District Court of the 18th Judicial District of the State of Montana in and for the County of Hill,

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*Page-number appearing at foot of page of original certified Transcript of Record.

was filed in the United States District Court for the District of Montana, the complaint in said action being in the words and figures following, to wit: [2]

In the District Court of the Eighteenth Judicial District of the State of Montana, in and for the County of Hill.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff complains and alleges:

1. That the defendant New Jersey Insurance Company is now, and at all of the times herein mentioned was, a corporation organized and existing under the laws of the State of New Jersey, and doing business in the State of Montana.

2. That on the 3d day of July, 1921, at the City of Helena, and State of Montana, in consideration of the payment by plaintiff to defendant of the premium of ninety-four and seventy-five one hundredths ($94.75) dollars, defendant made and delivered to plaintiff its policy of insurance in writing upon the body, machinery and equipment of that certain Marmon automobile, type B 4-passenger, factory No. 4220048, motor No. 6983, more fully described in the said policy of insurance, a

copy of which is annexed to this complaint, marked Exhibit "A," and by this reference made a part hereof; and thereby insured the plaintiff in the sum of four thousand four hundred seventy-five ($4475.00) dollars against damage to the said automobile or equipment, in excess of one hundred dollars, by being in accidental collision during the period insured with any other automobile, vehicle or object, as well as against loss by fire, *lighting*, transportation, theft, robbery and pilferage for the term of one year from and after the 3d day of July, 1921. [3]

3. That on the 18th day of July, 1921, while said insurance policy was in full force and effect, and the automobile therein described was being operated by plaintiff upon the public highway in Hill County, Montana, the said automobile was completely wrecked, damaged and destroyed by the front axle of said automobile coming and being in accidental collision with the surface of the road upon which the plaintiff was at said time driving, whereby said automobile was overturned and wrecked, and its value thereby impaired and destroyed.

4. That the intrinsic value and the cash value of the said automobile at the time of the said accident above described, and just prior thereto, was four thousand four hundred dollars; and that the loss and damage to the said automobile caused by the said accidental collision above described was four thousand dollars; and that the said loss and damage to the said automobile was not due

to puncture, cut, gash, blowout, or other ordinary tire trouble, but was wholly due to the accidental collision above described; and that the said automobile was not at the time of said collision being operated in any race or speed contest, and was not being operated by any person under the age of sixteen years, or under the age limit fixed by law.

5. That plaintiff ascertained and estimated the loss and damage to the said automobile to amount to the sum of four thousand four hundred dollars, but that defendant did not agree thereto and refused to agree thereto; and the plaintiff and the defendant, being unable to agree upon the amount of the said loss and damage, did on or about the 7th day of January, 1922, agree in writing to submit the question of the said loss and damage to appraisers, and that the said appraisers should appraise, ascertain and determine the sound value and the loss upon the property damaged or destroyed by the said collision, and did further agree that the said appraisers [4] should first select a competent and disinterested umpire who should act with them in matters of difference only, and that the award of any two of them made in writing should be binding upon the plaintiff and defendant herein as to the amount of such loss. And the plaintiff did in said writing select one appraiser named therein, and the defendant did in said writing select one appraiser named therein, and the two appraisers so chosen did, on or about the 15th day of January, 1922, select a competent and disinterested umpire; and thereafter the said ap-

praisers together did estimate and appraise the loss and damage to the said automobile, stating separately sound value and damage; and, failing to agree, did submit their differences to the said umpire; and thereafter, on or about the 16th day of January, 1922, the said umpire and one of the said appraisers did determine the amount of the said loss and damage to the said automobile, and did make, execute and deliver the award in writing of the amount of such loss and damage, wherein and whereby the said appraiser and umpire did fix and determine the sound value of the said automobile to be the sum of four thousand four hundred dollars, and the loss and damage thereto to be the sum of four thousand dollars; which said award so made, executed and delivered by the said appraisers was delivered and submitted to the defendant corporation at Butte, Montana, on or about the 18th day of January, 1922.

6. That the defendant has not paid the said sum of four thousand dollars, nor any part thereof, and that more than sixty days has elapsed after the notice, ascertainment, estimate and satisfactory proof of the loss required by the said policy has been received by the defendant corporation, including the award by the appraisers above referred to.

7. That on the 26th day of January, 1922, defendant, by notice in writing to the plaintiff, refused to pay the said loss by damage, and notified the plaintiff that the said award would be disregarded [5] by it, and would be treated as

void and not binding upon it in any manner or at all.

8. That plaintiff has kept and performed all of the terms and conditions of the said policy by him to be kept and performed.

9. That there is now due and owing from the defendant to the plaintiff the sum of four thousand dollars with interest thereon at the rate of eight per cent per annum from and after the 26th day of January, 1922.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of four thousand ($4,000.00) dollars, with interest thereon at the rate of eight per cent per annum from the 26th day of January, 1922, to date of judgment, together with his costs in this action necessarily expended.

NOLAN & DONOVAN,
J. P. DONNELLY,
Attorneys for Plaintiff.

State of Montana,
County of Hill,—ss.

C. W. Young, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

C. W. YOUNG.

Subscribed and sworn to before me this 27th day of March, 1922.

[Seal] J. P. DONNELLY,

Notary Public for the State of Montana, Residing at Havre, Montana.

My commission expires Mar. 8, 1925. [6]

Exhibit "A."

Non-Valued Fire, Theft and Transportation Form. Automobile Policy.

No. A 370712.

NEW JERSEY INSURANCE COMPANY,
Newark, New Jersey.

Pacific & Western Canadian Department, San Francisco, Seeley & Co., Managers.

IN CONSIDERATION of the Warranties and the Premium hereinafter mentioned.

DOES INSURE

The Assured named and described herein upon the body, machinery and equipment of the automobile described herein while within the limits of the United States (exclusive of Alaska, the Hawaiian Islands and Porto Rico) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits, for the term herein specified and to an amount not exceeding the amount of insurance herein specified, against direct loss or damage caused while this policy is in force, by the perils specifically insured against.

Amount—$4475.00. Rate—1.00. Premium—$44.75.
Names of Assured—C. W. Young.
Address of Assured—No. —— Street. City—Havre. State—Mont.

The term of this policy begins at noon on the 3d day of July, 1921, and ends at noon on the 3d day of July, 1922, Standard time. Amount of insurance Forty-four hundred seventy-five dollars ($4475.00). [7]

Automobile Department.
$100 Deductible Clause.

COLLISION CLAUSE.

(Covering Damage Sustained in Excess of $100.)
(Deductible.)

In consideration of an additional premium of $50.00 this policy also covers subject to its other conditions, damage to the automobile and/or equipment herein described in excess of $100 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object, excluding (1) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble; and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile, (2) loss or damage while the automobile insured is being operated in any race or speed contest or while being operated by any per-

son under the age of sixteen years or under the age limit fixed by law.

b. In the event of loss or damage to said automobile whether such loss or damage is covered by the policy or not, the liability of this company for loss or damage resulting from collision in accordance with the terms of this endorsement shall be reduced by the amount of such loss or damage until repairs have been completed but shall then attach for the full amount as originally written without additional premium.

It is hereby understood and agreed that loss under this collision clause is limited to the intrinsic value of the machine at time of accident, if any.

All other terms and conditions of this policy remaining unchanged.

Attached to and forming part of Policy No. 370712 of the New [8] Jersey Insurance Company.

Dated July 3d, 1921.

Agency at Helena, Mont.

R. L. DIGGS,
Agent.
By E. F. CAMERON.

SEELEY & CO.
General Agents and Managers, Seattle, San Francisco, Portland, Vancouver, B. C.

The following are statements of fact known to and warranted by the Assured to be true, and this policy is issued by the Company relying upon the truth thereof:

1: Assured's occupation or business is—Retired.

2: The following is the description of the automobile:

Model Year	Trade Name	Type of Body (If truck, state tonnage)	Factory Number	Motor Number
1921	Marmon	Type B 4-pass	4220048	6983
List Price	Motive Power	Number Cylinders	Advertised Horse Power	
3985	Gas	6	34	

3: The facts with respect to the purchase of the automobile are as follows:

Mo.	Year	Purchased by the Assured New or Second Hand	Actual cost to Assured including equipment
7	1921	New	4475.00

The Automobile described is fully paid for by the Assured and is not Mortgaged or otherwise Encumbered, except as follows:

Fully paid for

4: The uses to which the automobile described are and will be put, are—Business and pleasure.

5: The automobile described is usually kept in private garage, located

(State whether private or public)

No. —— Street —— City Havre State Mont.

Countersigned at Helena, Mont., this 3d day of July, 1921.

R. L. DIGGS, Agent.

By E. F. CAMERON. [9]

PERILS INSURED AGAINST.

(Except as hereinafter provided.)

(A) Fire arising from any cause whatsoever and lightning.

(B) While being transported in any conveyance

by land or water—*strading,* sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the Assured is legally liable.

(C) Theft, robbery or pilferage, excepting by any person or persons in the Assured's household or in the Assured's service or employment whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion or secretion by a mortgagor or vendee in possession under mortgage, conditional sale or lease agreement, and excepting in any case other than in case of total loss of the automobile described herein, the theft, robbery or pilferage of tools and repair equipment.

EXCLUSIONS.

1: It is a condition of this policy that this Company shall not be liable for:

(a) Loss or damage to robes, wearing apparel, personal effects or extra bodies;

(b) Loss or damage which may be caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power;

2: It is a condition of this policy that it shall be null and void:

(a) If the automobile described herein shall be used for carrying passengers for compensation, or rented, or leased, or operated in any race or speed contest during the term of this policy;

(b) If at the time a loss occurs there be any other insurance covering against the risks assumed

by this policy which would attach if this insurance had not been effected; [10]

(c) If the interest of the Assured in the property be other than unconditional and sole ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage except as stated in Warranty No. 3 or otherwise endorsed hereon;

(d) If this policy or any part thereof shall be assigned without the consent of this Company endorsed hereon or in case of transfer or termination of any interest of the Assured other than by the death of an Assured, or any change in the nature of the insurable interest of the Assured in the property described herein, either by sale or otherwise.

SPECIAL PROVISIONS.

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the Assured to repair or replace the same with material of like kind and quality; such ascertainment or estimate shall be made by the Assured and this Company, or, if they differ, then by Appraisers as herein provided. It shall be optional with this Company to take all or any part of the property at such ascertained or appraised value and also to repair, rebuild or replace the property lost or damaged with out of like kind and quality

within a reasonable time, on giving notice within thirty days after the receipt of sworn statement of loss herein required of its intention so to do; but there can be no abandonment to the Company of the property described.

CONDITIONS.

Notice and Proof of Loss

In the event of loss or damage the assured shall forthwith give notice thereof in writing to this Company or the authorized agent who issued this policy, [11] and shall protect the property from further loss or damage; and within sixty days thereafter, unless such time is extended in writing by this Company shall render a statement to this Company, signed and sworn to by the said Assured, stating the knowledge and belief of the Assured as to the time and cause of the loss or damage, the interest of the Assured and of all others in the property; and the Assured as often as required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

It is a condition of this policy that failure on the part of the Assured to render such sworn state-

ment of loss to the Company within sixty days of the date of loss (unless such time is extended in writing by the Company) shall render such claim null and void.

Appraisal

In the event of disagreement as to the amount of loss or damage the same must be determined by competent and disinterested appraisers before recovery can be had hereunder. The Assured and this Company shall each select one, and the two so chosen shall then select a competent and disinterested umpire. Thereafter the appraisers together shall estimate and appraise the loss or damage, stating separately sound value and damage, and failing to agree, shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss or damage; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

Payment of Loss

This Company shall not be held to have waived any provision on condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal [12] or to any examination herein provided for; and the sum for which this Company is liable, pursuant to this policy, shall be payable sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by this Company, including an award by appraisers when appraisal is required hereunder.

Protestion of Salvage

Any act of the Assured or this Company, or its agents, in recovering, saving and preserving the property described herein in case of loss or damage, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and all reasonable expenses thus incurred shall constitute a claim under this policy.

Subrogation

If this Company shall claim that the loss or damage was caused by the act or neglect of any person or corporation, private or municipal, this Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the Assured for the loss resulting therefrom, and such right shall be assigned to this Company by the Assured on receiving such payment.

It is a condition of this policy that this insurance shall not inure to the benefit of any carrier whatsoever but the right of the Assured to recover under this policy shall not be prejudiced by any release from liability which may have been given to any railroad or other carrier or bailee in any bill of lading or other contract of carriage or storage, and this Company conceded to the Assured the right to give such release; any right of recovery the Assured is entitled to against said carrier or others shall, by subrogation, inure to the benefit of this Company upon payment of the claim and this Company shall be entitled, if it so desire, to take over and conduct in the name of the Assured, the defense of any action or to prosecute any claim for in-

demnity, damages or otherwise against any third party.

Cancellation This policy shall be cancelled at any time at the request of the Assured; or by the Company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore [13] provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate; except that when this policy is cancelled by this Company by giving notice it shall retain only the *pro rata* premium. Notice of cancellation mailed to the address of the Assured stated in the policy shall be a sufficient notice; the check of the Company, or its agent, when similarly mailed shall be a sufficient tender of any unearned premium.

Misrepresentation and Fraud This entire policy shall be void if the Assured or his agent has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof; or if the Assured or his agent shall make any attempt to defraud this Company either before or after the loss.

Agent No person shall be deemed an agent of this Company unless specifically authorized in writing by the Company.

Suit Against Company No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity unless the Assured shall have fully complied with all the fore-

going requirements, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable, unless commenced within the shortest limitation permitted under the laws of such state.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE PROVISIONS, EXCLUSIONS,CONDITIONS AND WARRANTIES SET FORTH HEREIN OR ENDORSED HEREON together with such other provisions, exclusions, conditions or warranties as may be endorsed hereon or added hereto, and upon acceptance of this policy the Assured agrees that its terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein, and no officer, agent or other representative [14] of this Company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY. This policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy

shall not be valid unless countersigned by a duly authorized Agent of the Company.

J. B. CUTERIE, Secretary. J. STEWART, President.

TRANSFER (For Assured to sign) ONLY AFTER CONSENT OF COMPANY HAS BEEN OBTAINED.

The ownership of the property herein insured having actually passed to ——————— for value received, —— hereby transfer, and assign, unto —— all —— title and interest in this policy, subject to all the terms and conditions herein mentioned and referred to.

Occupation of new owner? ——. Address ——.

New location of car? ——. Public or private garage? ——.

Date when purchased? ——. Cost to new owner, including its equipment, was $——.

Is this automobile mortgaged or in any way encumbered? ——.

Is automobile fully paid for? ——.

If bought on installments state amount due and terms for payment $——. The automobile is to be used ONLY for —— purposes.

Will this automobile be used to carry passengers for compensation? ——.

Dated ——, 19——.

———————,
Assured.

Witness: ———————. [15]

CONSENT (For Agent to sign) ONLY AFTER CONSENT OF COMPANY HAS BEEN OBTAINED.

The ownership of the property herein insured having actually passed to ———————— THE NEW JERSEY INSURANCE COMPANY relying upon the truth of the foregoing statement of facts, hereby consents that the interest of —— in the within Policy, subject to all terms and conditions herein mentioned and referred to, and subject to the payment of any premium due, or to become due hereon, be assigned to ——.

D ————, 19——.

————————,
Agent.

If this policy is cancelled the following receipt is to be filled up and signed by the insured.

————————, 19——.

IN CONSIDERATION of —— Dollars, Return Premium, the Receipt of which is hereby acknowledged, this Policy is cancelled and surrendered to the NEW JERSEY INSURANCE COMPANY.

————————,
Assured.

(Endorsed on back:)
Form No. 2.
AUTOMOBILE POLICY.
(Non-valued Fire, Theft and Transportation Form.)
Expires—July 3d, 1922.
Property—C. W. Young.
Amount—$4475.00.
Premium—$94.75.

No. A370712.
NEW JERSEY INSURANCE COMPANY.
Newark, New Jersey.
Capital $1,000,000.
SEELEY & CO.
Managers, Pacific Coast Department,
Coleman Building.

Seattle, Wash.

R. L. DIGGS,
Agent.

Fire	24.61
Theft	20.14
Collision $100 ded.	50.00
	94.75

Complaint filed Mar. 28, 1922. Geo. W. Glass, Clerk. [16]

Thereafter on June 26, 1922, the defendant's answer was duly filed herein, which is in the words and figures following, to wit: [17]

In the United States District Court for the District of Montana, Butte Division.

No. 350.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Corporation,

Defendant.

Answer.

Now comes the above-named defendant and for its answer to the complaint of the plaintiff on file herein admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in paragraph 1 of said complaint.

II.

Admits the allegations of paragraph 2 of said complaint.

III.

Denies the allegations of parargaph 3 of said complaint.

IV.

As to the allegations of paragraph 4 that the intrinsic value and the cash value of said automobile at the time of the alleged accident, or just prior thereto, was four thousand four hundred ($4,400.00) dollars, this defendant denies any knowledge or information sufficient to form a belief.

Denies that the loss or damage to said automobile caused by any accidental collision whatever, in any manner whatever, was four thousand ($4,000.00) dollars or any other or greater sum than fifteen hundred ($1500.00) dollars.

Admits that the said alleged loss and damage to said automobile was not due to puncture, cut, gash, blowout or other ordinary tire trouble, and denies that said loss or damage to said automobile was wholly due or due at all to accidental collision as described in said complaint, or otherwise, in any manner whatever, or at all. [18]

As to the allegations that said automobile was not at the time of said collision or any collision being operated in any race or speed contest and was not being operated by any person under the age of sixteen (16) years or under the age limit fixed by law, this defendant denies any knowledge or information sufficient to form a belief.

V.

As to the allegations of paragraph 5, this defendant admits that there was a disagreement between the plaintiff and defendant as to the amount of loss or damage to the automobile in question, and that there was an agreement to submit the question of said loss and damage to appraisers.

Denies each and every other allegation contained in paragraph 5 except as the same is herein specifically admitted, denied or explained, and in this connection this defendant avers the facts to be:

That on or about the 7th day of January, 1922, the said plaintiff and defendant entered into an

agreement or submission to appraisers, and the plaintiff named as appraiser, Dan W. McNicol, and the defendant named as appraiser, Malcolm McLeod: that the said appraisers made their declaration under oath, selected George B. Bourne as umpire, the said George B. Bourne, as umpire, qualified under oath and thereafter, on the 16th day of January, 1922, George B. Bourne and Dan W. McNicol made an award in writing, a copy of which said agreement to submission to appraisers, together with the declaration of the appraisers, selection of umpire, qualification of umpire and award is hereto attached and hereof made a part, marked Exhibit 1.

That the said Dan McNicol named as one of the appraisers in said agreement for submission to appraisers, and the said George B. Bourne, named as umpire, were neither of them competent or disinterested at the time of their selection, and the said pretended award signed by said George B. Bourne and Dan W. McNicol was void in that it did not conform to the terms of the policy in this: that it did not show that the said appraisers, to wit: Dan W. McNicol and Malcolm McLeod together ascertained or appraised the amount of loss or damage, nor that they stated separately the sound value and damage and failed to agree, and that thereafter they submitted their differences to the umpire.

That as a fact, the said appraisers Dan W. McNicol and Malcolm McLeod on or about the 15th day of January, 1922, met at Havre, Montana and proceeded [19] to examine the car and determine what was necessary to be supplied, and the cost

thereof, and the total amount of damage to the said car; that the said appraisers itemized each part to be supplied and the cost thereof, and agreed as to the amount of damage and the need of new parts specifically, with one exception, and that was as to the necessity of a new frame; that a difference of opinion arose as to the necessity of a new frame and this was submitted to George B. Bourne, the umpire named, as aforesaid; that said George B. Bourne, umpire as aforesaid, decided that a new frame was necessary, and it was agreed that the cost thereof was two hundred and fifty ($250.00) dollars and the hours required to put the same on was fifty (50) hours. It was further agreed that a new body was necessary, but the cost thereof could not be estimated until word was received from the factory relative thereto.

That while inquiry was being made over the telephone by Malcolm McLeod, one of the appraisers, to ascertain the cost of the new body, one J. P. Donnelly, attorney for C. W. Young, plaintiff, talked with Dan W. McNicol, the appraiser and thereupon the said Dan W. McNicol refused to consider any other estimate of the value of the car and the damage thereto than the sum of Three thousand seven hundred ($3700.00) dollars, allowing only three hundred ($300.00) dollars as the value of the wrecked car and the salvage thereon.

That thereupon, the meeting of the appraisers was adjourned and no further steps were taken by the appraisers under the said submission as above set forth.

That on or about the 16th day of January, 1922, the said Malcolm McLeod left Havre and no further hearings were had, nor did said appraisers again meet; that the said umpire, George B. Bourne, was not called in in any manner after any other disagreement of the appraisers as above set forth to act with them in the matter of any differences whatever, save and except the difference as to the necessity of a new frame as above set forth; that the said umpire never had, in any manner, whatever, submitted to him any other matters of difference save and except the question of the necessity of the new frame which was determined by him as above set forth.

That the said George B. Bourne, as umpire under the agreement for submission to appraisers had authority to act with said appraisers in matters of difference [20] only; that it was necessary for the said umpire, in order to determine any matter of difference, to hear the evidence submitted by both sides and to estimate what, if any, difference existed between the said appraisers and to determine such difference only after said submission to him; that said appraiser, Malcolm McLeod, had no information of any difference existing between himself and the appraiser, Dan McNicol except as above set forth; that said Dan McNicol did not, in any way, offer to submit any difference as to the value of the car or the damage thereto, or the loss or damage occasioned by said alleged accident, to the said George B. Bourne, the umpire, and the said Dan McNicol withdrew from the appraisement and

repudiated the value and amount of damage arrived at by himself and appraiser Malcolm McLeod after his conversation with J. P. Donnelly, attorney for the plaintiff; that the said umpire, George B. Bourne, did not participate in said appraisal, knew nothing of the facts connected with the loss and damage to the car, did not arrive at any result after calm, careful and judicial consideration of facts submitted to him by the appraisers, but in the absence of the appraiser, Malcolm McLeod, and after the meeting had been adjourned, and without any hearing or information whatever, the said George B. Bourne, as umpire, and the said Dan W. McNicol, one of the appraisers, signed the award as set forth in said Exhibit 1 and not otherwise.

VI.

As to the allegations contained in paragraph 6 of said complaint, this defendant admits that it has not paid the sum of four thousand ($4,000.00) dollars nor any part thereof. Denies each and every other allegation of said paragraph 6.

VII.

As to the allegations of paragraph 7, admits that on or about the 26th day of January, 1922, the defendant served upon the plaintiff notice in writing, a copy of which is hereto attached marked Exhibit 2 and hereof made a part. Denies each and every other allegation of said paragraph 7 of said complaint not hereinbefore specifically admitted.

VIII.

Denies the allegations of paragraph 8 of said complaint. [21]

IX.

Denies the allegations of paragraph 9 of said complaint.

FOR FURTHER ANSWER AND FIRST AFFIRMATIVE DEFENSE to the complaint of the plaintiff on file herein, this defendant avers the fact to be:

I.

That by the terms of the policy of insurance, a copy of which is attached to plaintiff's complaint and marked Exhibit "A," it was specified among other things:

> "In consideration of an additional premium of $50.00 this policy also covers subject to its other conditions, damage to the automobile and/or equipment herein described in excess of $100 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object."

II.

That on or about the 18th day of July, 1921, at the time mentioned and specified in the complaint of the plaintiff on file herein, the said automobile of said plaintiff, while being operated by plaintiff upon the public highway in Hill County, Montana, was wrecked and damaged in the manner following, to wit, and not otherwise: The front axle of said automobile for some reason unknown to the defend-

ant, broke and by reason thereof, the said automobile was overturned, and the injury and damage to the same occasioned, and produced, by reason of the said breaking of said axle and the overturning of said automobile; that the said automobile did not come into accidental collision or otherwise with the surface of the road upon which the same was at said time being driven until by reason of breaking of said front axle said car was overturned and wrecked. That the breaking of said axle was the direct and proximate cause of damage and injury to said car; that there was no collision with any other automobile, vehicle or object, and that the loss and damage to the said automobile was caused by reason of the said breaking of the said front axle of same and not otherwise.

III.

That the fact that said front axle of said automobile broke and caused said automobile to be overturned and wrecked was not within the terms of the [22] policy of insurance above quoted and was not an accidental collision within the terms and meaning of the risks insured against in said policy and that by reason thereof the said plaintiff has no grounds for the relief sought to be recovered in this action against said defendant.

FOR A FURTHER AND SECOND AFFIRMATIVE DEFENSE to the complaint of the plaintiff on file herein, this defendant avers:

I.

That the policy of insurance attached to plain-

tiff's complaint and marked Exhibit "A" contains the following clause:

> "It is a condition of this policy that it shall be null and void:
>
> * * * * * * * * * * *
>
> (b) If at the time a loss occurs there be any other insurance covering against the risks assumed by this policy which would attach if this insurance had not been effected; * * * "

II.

That the said plaintiff on the 13th day of June, 1921, made and executed an order upon the T. C. Power Motor Car Company, a corporation organized and existing under the laws of the state of Montana, and located at Helena, Montana, for the purchase of the automobile described in the plaintiff's complaint herein. That pursuant to said order blank, the said automobile therein described, being the automobile mentioned and described in plaintiff's complaint, was delivered to said plaintiff on or about the 1st day of July, 1921; that accompanying said order blank, and as a part thereof, there was a specific warranty, which said warranty was in words and figures following, to wit:

> "We warrant each new motor vehicle manufactured by us, whether passenger car or commercial vehicle, to be free from defects in material and workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the

original purchaser, be returned to us with transportation charges prepaid, and which our examination shall disclose to our satisfaction to have been thus defective, this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles."

That by the terms of said warranty the said plaintiff was insured against [23] loss or damage to the car by reason of defects in material and workmanship, and that said warranty constituted an insurance against risks assumed in said policy of insurance and which would attach if said insurance had not been effected, and that by reason whereof, in accordance with the terms and conditions of said policy above set forth, said policy was null and void.

FOR A FURTHER AND THIRD AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That the policy of insurance attached to plaintiff's complaint marked Exhibit "A" contains the following:

"It is a condition of this policy that it shall be null and void:

* * * * * * * * * * *

(b) If at the time a loss occurs there be any other insurance covering against the risks assumed by this policy which would attach if this insurance had not been effected";

II.

That at the time of the purchase of said car on or about the 1st day of July, 1921, and at the time of the accident, there was a latent defect in the front axle of said automobile described in plaintiff's complaint, and which said defect caused the front axle of said automobile to break, the said car to overturn and the damage and wrecking of said car was occasioned and brought about by reason of said latent defect in said front axle.

III.

That the Marmon Motor Company, the manufacturer of said automobile by reason of the defect in the said front axle of said automobile became and was liable to the purchaser of said automobile, to wit: plaintiff, for damage occasioned to said car by reason of the damage to the said car occasioned by the said defect in said front axle thereof; that the said Marmon Motor Company had secured from United States Fidelity & Guaranty Company, a policy of insurance to protect and save harmless the said Marmon Motor Company from all loss and liability occasioned through defect in the parts of said automobile; the exact terms of which said policy of insurance are to the defendant unknown; [24] that said policy of insurance covered against the risks assumed by the policy of insurance attached to plaintiff's complaint marked Exhibit "A," and was in full force and effect on the 18th day of July, 1921, when the loss, if any, occurred. That by reason of said insurance as above set forth covering

against the risks assumed by this policy, this policy became null and void.

FOR A FURTHER AND FOURTH AFFIRMATIVE DEFENSE, this defendant avers:

I.

That the policy of insurance attached to plaintiff's complaint on file herein, marked Exhibit "A" contains the following condition:

> "In the event of loss or damage the assured shall forthwith give notice thereof in writing to this Company or the authorized agent who issued this policy, and shall protect the property from further loss or damage; and within sixty days thereafter, unless such time is extended in writing by this Company shall render a statement to this Company, signed and sworn to by the Assured, stating the knowledge and belief of the Assured as to the time and cause of the loss or damage, the interest of the Assured and of all others in the property; * * *"

Also:

> "It is a condition of this policy that failure on the part of the Assured to render such sworn statement of loss to the Company within sixty days of the date of loss (unless such time is extended in writing by the Company) shall render such claim null and void."

II.

That the said plaintiff did not immediately after the loss or damage to plaintiff's automobile, on or about the 8th day of July, 1921, give notice thereof

in writing to the defendant Company or the authorized agent who issued said policy, nor did said plaintiff render a statement to said Company signed and sworn to by said plaintiff stating knowledge and belief of plaintiff as to the time and cause of the loss, or damage, the interest of the assured and of all others in the property; nor did the plaintiff render any such sworn statement of loss to the Company within sixty days after the 8th day of July, 1921, or at any other time, and that by reason of failure of said plaintiff so to do the said claim of plaintiff became null and void. [25]

FOR A FURTHER AND FIFTH AFFIRMATIVE DEFENSE, this defendant avers:

I.

That the policy of insurance attached to plaintiff's complaint contains the following provision:

> "In the event of disagreement as to the amount of loss or damage the same must be determined by competent and disinterested appraisers before recovery can be had hereunder. The assured and this Company shall each select one, and the two so chosen shall then select a competent and disinterested umpire. Thereafter the appraisers together shall estimate and appraise the loss or damage, stating separately sound value and damage, and failing to agree, shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss or damage; the parties thereto shall pay the appraiser

respectively selected by them and shall bear equally the expenses of the appraisal and umpire."

II.

That there was a disagreement between the plaintiff and defendant as to the amount of loss or damage and thereupon appraisers were named as set forth in Exhibit 1 hereto attached and hereof made a part; that the said appraisers duly qualified and entered upon the discharge of their duties, selected one George B. Bourne as umpire as set forth in said Exhibit 1 hereto attached and hereof made a part, and later an award was signed by the said George B. Bourne and one Dan W. McNicol, appraiser selected by plaintiff, as set forth in said Exhibit 1 hereto attached and hereof made a part. That upon receipt of said award as above set forth the said defendant served upon the plaintiff its notice and refusal to recognize the award, which said notice is in words and figures as set forth in Exhibit 2 hereto attached and hereof made a part.

III.

That the said Dan W. McNicol named as one of the appraisers in said agreement for submission to appraisers, and the said George B. Bourne, named as umpire were neither of them, competent or disinterested at the time of their selection, and the said pretended award signed by said George B. Bourne and Dan W. McNicol was void in that it did not conform to the terms of the policy in this: that it did not show that the said appraisers, to wit: Dan McNicol and Malcolm McLeod together ascer-

tained or appraised the amount of loss or damage, nor that thereafter they submitted their difference to the umpire. [26]

That as a fact, the said appraisers Dan W. McNicol and Malcolm McLeod, on or about the 15th day of January, 1922, met at Havre, Montana, and proceeded to examine the car and determine what was necessary to be supplied, and the cost thereof, and the total amount of damage to the said car; that the said appraisers itemized each part to be supplied and the cost thereof, and agreed as to the amount of damage and the need of new parts specifically, with one exception, and that was as to the necessity of a new frame; that a difference of opinion arose as to the necessity of a new frame and this was submitted to George B. Bourne, the umpire named, as aforesaid; that said George B. Bourne, umpire as aforesaid, decided that a new frame was necessary, and it was agreed that the cost thereof was Two Hundred and Fifty ($250.00) dollars and the hours required to put the same on was fifty (50) hours. It was further agreed that a new body was necessary but the cost thereof could not be estimated until word was received from the factory relative thereto.

That while inquiry was being made over the telephone by Malcolm McLeod, one of the appraisers, to ascertain the cost of the new body, one J. P. Donnelly, attorney for C. W. Young, plaintiff, talked with Dan W. McNicol, the appraiser and thereupon the said Dan W. McNicol refused to consider any other estimate of the value of the car and

the damage thereto than the sum of Three Thousand seven hundred ($3,700.00) dollars, allowing only three hundred ($300.00) dollars as the value of the wrecked car and the salvage thereon.

That thereupon, the meeting of the appraisers was adjourned and no further steps were taken by the appraisers under the said submission as above set forth.

That on or about the 16th day of January, 1922, the said Malcolm McLeod left Havre and no further hearings were had, nor did said appraisers again meet; that the said umpire, George B. Bourne, was not called in in any manner after any other disagreement of the appraisers as above set forth to act with them in the matter of any differences whatever, save and except the [27] difference as to the necessity of a new frame as above set forth; that the said umpire never had, in any manner, whatever, submitted to him any other matters of difference save and except the question of the necessity of the new frame which was determined by him as above set forth.

That the said George B. Bourne, as umpire under the agreement for submission to appraisers had authority to act with said appraisers in matters of difference only; that it was necessary for the said umpire, in order to determine any matter of difference, to hear the evidence submitted by both sides and to estimate what, if any, difference existed between the said appraisers and to determine such difference only after said submission to him; that said appraiser, Malcolm McLeod, had no infor-

mation of any difference existing between himself and the appraiser, Dan McNicol, except as above set forth; that said Dan McNicol did not, in any way, offer to submit any difference as to the value of the car or the damage thereto, or the loss or damage occasioned by said alleged accident, to the said George B. Bourne, Umpire as aforesaid, and the said Dan McNicol withdrew from the appraisement and repudiated the value and amount of damage arrived at by himself and appraiser Malcolm McLeod after his conversation with J. P. Donnelly, attorney for the plaintiff; that the said umpire, George B. Bourne, did not participate in said appraisal, knew nothing of the facts connected with the loss and damage to the car, and did not arrive at any result after calm, careful and judicial consideration of facts submitted to him by the appraisers, but in the absence of the appraiser, Malcolm McLeod, and after the meeting had been adjourned, and without any hearing or information whatever, the said George B. Bourne, as umpire, and the said Dan W. McNicol, one of the appraisers, signed the award as set forth in said Exhibit 1 and not otherwise. [28]

IV.

That by reason of the foregoing fact, said award signed by said George B. Bourne and Dan McNicol was null and void and of no effect.

WHEREFORE, this defendant having fully answered, asks to be dismissed with its costs in this behalf expended.

GEORGE F. SHELTON,
Attorney for Defendant.

State of Montana,
Silver Bow County,—ss.

George F. Shelton, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and makes this affidavit on behalf of said defendant for the reason that there is no officer of said defendant Company in the county wherein affiant resides, to wit: Silver Bow County, Montana; that he has read the foregoing answer, knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 26 day of June, 1922.

[Notarial Seal] GEORGE D. TOOL,
Notary Public for the State of Montana, residing at Butte, Montana.
My commission expires Mar. 15, 1925. [29]

Exhibit No. 1.

PACIFIC COAST ADJUSTMENT BUREAU,

Merchants Exchange Building, San Francisco.

AGREEMENT FOR SUBMISSION TO APPRAISERS.

THIS AGREEMENT, made and entered into by and between C. W. Young of the first part, and the Insurance Company or Companies, whose name

or names are signed hereto, of the second part, each for itself and not jointly.

WITNESSETH: That Dan McNicol and Malcolm McLeod shall appraise, ascertain and determine the sound value of the loss upon the property damaged and (or) destroyed by the collision of July 18, 1921, as specified below. PROVIDED, That the said APPRAISERS shall FIRST select a competent and disinterested umpire who shall act with them in matters of difference ONLY. The award of any two of them, made in writing, in accordance with this agreement shall be binding upon both parties to this agreement as to the amount of such loss.

It is expressly understood that this agreement and appraisement is for the purpose of ascertaining and fixing the amount of sound value and loss and (or) damage ONLY, to the property hereinafter described, and shall not determine, waive or invalidate any other right or rights of either party to this agreement.

The property on which the sound value and the loss (or) damage is to be determined is as follows, to wit: 1—1921 4 Passenger Marmon Automobile Factory No. 4220048, Motor No. 6983.

It is further expressly understood and agreed that in determining the sound value and the loss or damage upon the property hereinbefore mentioned, the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire; and

in case of depreciation of the property from use, age, condition, location or otherwise, a proper deduction shall be made therefor.

IN WITNESS WHEREOF, we have hereunto set our hands, at Havre, Mont., this 7th day of January, 1922.

C. W. YOUNG,
NEW JERSEY INSURANCE COMPANY.
By PACIFIC COAST ADJUSTMENT BUREAU.
By F. H. HENDERSON,
Adjuster. [30]

DECLARATION OF APPRAISERS.

State of Montana,
County of Hill,—ss.

We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the sound value of the loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of the same according to the best of our knowledge, skill and judgment. We are NOT related to the assured, either as creditors or otherwise, and are NOT interested in said property or the insurance thereon.

M. MacLEOD,
D. W. McNICOL,
Appraisers.

Subscribed and sworn to before me, this 15th day of Jan., 1922.

J. P. DONNELLY,

Notary Public for the State of Montana, Residing at Havre, Montana.

My commission expires Feb. 27, 1922.

SELECTION OF UMPIRE.

We, the undersigned, hereby select and appoint Geo. Bourne to act as umpire to settle matters of difference that exist between us by reason of and in compliance with the foregoing agreement and appointment.

Witness our hands this 15th day of January, 1922.

M. MacLEOD,.

M. MacLEOD,

QUALIFICATION OF UMPIRE.

State of Montana,

County of Hill,—ss.

I, the undersigned, hereby accept the appointment of umpire, as provided in the foregoing agreement, and solemnly swear that I will act with strict impartiality in all matters of difference ONLY that shall be submitted to me in connection with this appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am NOT related to any of the parties to this agreement nor interested as a creditor or otherwise in said property or insurance.

GEORGE B. BOURNE.

Subscribed and sworn to before me, this 15th day of Jan., 192—.

J. P. DONNELLY,
Notary Public for the State of Montana, Residing at Havre, Montana.

My commission expires Feb. 27, 1922.

To the Parties in Interest:

We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value to be Forty-four Hundred Dollars, and the loss and damage to be Forty Thousand Dollars.

Witness our hands this 16th day of January, 1922.

GEORGE B. BOURNE,
DAN W. McNICOL,
Appraisers. [31]

Exhibit No. 2.

January 26, 1922.

C. W. Young and Nolan & Donovan and J. P. Donnelly, His Attorneys, Butte, Montana.

Gentlemen:

The letter of Nolan & Donovan to New Jersey Insurance Company of date January 18, 1922, enclosing "Agreement for Submission to Appraisers" and the pretended award thereon has been received, but you are hereby notified that the said pretended award is void and not binding upon New Jersey Insurance Company, and will be disregarded by it for the reasons following:

(1) Dan McNicol named as one of the appraisers in said agreement for submission to appraisers was not competent or disinterested at the time of his selection as appraiser, which fact was not known to New Jersey Insurance Company, and was known to C. W. Young, the assured.

(2) That George B. Bourne named as umpire was not at the time competent and disinterested, which said fact was not known at the time of his selection, to New Jersey Insurance Company, and was known to C. W. Young, the assured.

(3) That the pretended award signed by George B. Bourne and Dan W. McNicol does not conform to the terms of the policy in this: That it does not show that the appraisers, to wit: Dan W. Nicol and Malcolm McLeod together estimated or appraised the loss or damage, nor that they stated separately the sound value and damage and failed to agree, and that thereafter, they submitted their difference to the umpire and in this connection, the facts are as follows:

That the appraisers named, Dan W. McNicol and Malcolm McLeod, on the 15th day of January, 1922, met at Havre and proceeded to examine the car and determine what was necessary to be supplied and the cost thereof, and the total amount of damage to the said car, and the said appraisers itemized each part to be supplied and the cost thereof, and agreed as to the amount of damage and the need of new parts specifically with one exception.

A question arose as to the necessity of a new frame, and for the purpose of determining whether a new frame was required, George B. Bourne was [32] named as umpire to make the determination and for this purpose only. That Bourne decided that a new frame was necessary, and it was agreed that the cost thereof, was $250.00 and the hours required to put the same on was fifty hours. It was further agreed that a new body was necessary but the cost thereof could not be estimated until word was received from the factory relative thereto.

While inquiry was being made over the telephone by McLeod, one of the appraisers, relative to the cost of the new body, one J. P. Donnelly, attorney for C. W. Young, had talked with Dan McNicol, the appraiser, and thereupon, the said Dan W. McNicol refused to consider any other estimate of the value of the car and the damage thereto than the sum of $3,700.00, allowing $300.00 in addition thereto as the value of the wreck; that thereupon the meeting of the appraisers was adjourned and no further steps were taken by the said appraisers under the submission; that on January 16th, 1922, the said Malcolm McLeod left Havre; that no further hearings were had, in any manner after the disagreement of the appraisers to act with them in the matter of any differences whatever, save and except the difference as to the new frame as above set forth; that the said umpire never had in any manner whatever, submitted to him any other matters of difference save and ex-

cept the question of the frame which was determined as above set forth.

That said Bourne as umpire under the Agreement for Submission to Appraisers could act with said appraisers in matters of difference only. It would be necessary for said umpire, in order to determine any difference, to hear the evidence submitted by both sides and to estimate what, if any, difference existed between the appraisers and to determine at the request of said appraisers, such difference. Appraiser McLeod was not apprised of any difference of opinion except as hereinbefore set forth, and the act of appraiser D. W. McNicol in withdrawing from appraisement and in repudiating the value arrived at by himself and appraiser McLeod was done by direction of one J. P. Donnelly, an attorney of Havre, Montana, who is attorney for the assured C. W. Young, and any decision thereafter made by said McNicol was not made voluntarily, freely and judicially by said appraiser, but was a result of the coercion, influence and tactics of said J. P. Donnelly; that the signature of George B. Bourne, umpire aforesaid, was a result of the coercion and influence of said J. P. Donnelly, attorney for C. W. Young, assured, and was not the result of calm, careful and judicial consideration of facts as submitted by the appraisers, and that said Bourne did not act with strict impartiality, and in making his decision, if any there was in this case, did not act in a matter of difference which was submitted to him in connection with his position as umpire as aforesaid.

That this award, if any there was signed in this case, was not a true, just and conscientious award based on any knowledge, skill or judgment; that said Bourne was without jurisdiction to make said award or any award except as to the value of said frame of said car, and the document submitted by you signed by D. W. McNicol is void as against the New Jersey Insurance Company and will be so treated by said Company.

Very truly yours,
NEW JERSEY INSURANCE COMPANY,
By ————————. [33]

Service of the foregoing answer acknowledged and copy received this 26 day of June, 1922.

J. P. DONNELLY,
NOLAN & DONOVAN,
Attorneys for Plaintiff.

Answer filed June 26th, 1922. C. R. Garlow, Clerk. [34]

———

Thereafter, on September 1, 1922, plaintiff's reply was duly filed herein, which is in the words and figures following, to wit: [35]

In the United States District Court, for the District of Montana, Butte Division.

C. W. YOUNG,
Plaintiff,
vs.
NEW JERSEY INSURANCE COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff, and for his reply to the answer of the defendant, admits, denies and alleges, as follows, to wit:

For his reply to the matters set forth in the fifth paragraph of the defendant's first defense, plaintiff denies that George B. Bourne, or Dan W. McNickol, or either of them, was incompetent to act as an appraiser of the loss or damage done to the plaintiff's automobile, and denies that they, or either of them, were in any manner interested in such appraisement, and plaintiff alleges that the award made by the said appraisers was made upon the printed form prepared by the defendant and submitted to the said appraisers for use by them in making of such appraisement, and that the said appraisement as made by the said appraisers was made in the manner and in the form agreed to by the defendant, and upon the form of appraisement prepared by the defendant, and by it submitted to the said appraisers for their use, and that plaintiff relied upon the said form prepared by the defendant for use by the said appraisers, and agreed thereto, and by its conduct and agreements herein alleged, the defendant is estopped from objecting to the said form of appraisement for insufficiency, and has waived any and all objection thereto, which it might otherwise have.

Plaintiff admits that plaintiff named as appraiser, Dan W. McNicol and the defendant named as an appraiser Malcolm MacLeod, and that the

said appraisers made their declarations under oath, selected George G. Bourne as umpire, and that the said George B. Bourne qualified under oath, and thereafter, on the 16th day of January, 1922, George B. Bourne and Dan W. McNicol made an award in writing, a copy of which said agreement for submission to appraisers, together with the declaration of the [36] appraisers, selection of umpire, qualifications of umpire, and award attached to the defendant's answer and marked Exhibit 1, and is correct, except that the amount of the loss and damage is erroneously stated in said alleged copy to be $40,000 dollars, whereas, the amount stated in the said award is $4000 dollars; and that the appraisers agreed that a new frame was necessary for the said car, and that a new body was necessary for the said car.

Plaintiff denies generally each and every other allegation in said paragraph five, or defendant's first defense.

FOR REPLY TO THE FURTHER ANSWER and first affirmative defense contained in the defendant's answer, plaintiff admits the allegations contained in paragraph I, thereof.

Admits that the said automobile of plaintiff was wrecked and damaged while being operated by plaintiff upon the public highway in Hill County, Montana.

Denies generally, each and every other allegation contained in the said further answer, and first affirmative defense.

FOR REPLY TO THE FURTHER ANSWER and fourth affirmative defense:

Plaintiff admits the allegations contained in paragraph II, of said fourth affirmative defense, plaintiff alleges:

That plaintiff received and suffered great bodily injuries at the time of, and in connection with, the damage to the said automobile, on or about the 18th day of July, 1921, and was, as a result of said injuries, confined to the Hospital and was unable to attend to business for approximately one week thereafter. That, nevertheless, the plaintiff, without unnecessary delay, caused notice of the said loss to be given in writing to the defendant, and its authorized agent, R. L. Diggs, on or about the 20th day of July, 1921, and that thereafter, at divers times between the 20th day of July, 1921, and the 16th day of September, 1921, the defendant had its agents personally investigate the loss and damage to the said automobile, and personally inspect and examine the wreck of the said automobile, and that at all times, the said defendant and its said agents were fully advised as to the time and cause of the [37] loss or damage to the said automobile and the interest of plaintiff and all others in the said automobile, and the defendant's said agents advised the plaintiff that it was not necessary for him to employ attorneys, or counsel, and that he would injure his prospect of procuring a settlement with defendant by doing so, and stated further to plaintiff that defendant denied any and all liability

under said Policy of Insurance for the reason that the loss and damage suffered by plaintiff was due to a defective axle and the breaking thereof; and by such advice and statement and conduct the plaintiff was led to believe, and did believe, that no further Proof of Loss was necessary or required, and relying thereon, plaintiff delayed the rendering of his sworn Statement of Loss until the 16th day of December, 1921. That, nevertheless, the plaintiff did, on or about the 16th day of September, 1921, make and mail to the defendant and its agents, by letter duly addressed, postage prepaid and deposited in the United States Postoffice, a statement, signed and sworn to by plaintiff, stating the knowledge and belief of the plaintiff as to the time and cause of the loss, or damage, the interest of the plaintiff, and of all others in the said property. That said notice of loss and sworn statement were, as plaintiff is informed and believes, received by the defendant in due course of mail, and the defendant did not, within a reasonable time, or at all, specify any grounds of objection to them or either of them, and did not, within a reasonable time or at all, make objection to the said notice of loss or sworn statement above referred to, or to either of them, and that defendant, by its failure to make objection to the said notice of loss, and proof of loss, waived all defects, if any, therein, and waived any defense that it might otherwise have, based upon the ground of delay in the presentation thereof.

FOR REPLY to the further and fifth affirmative defense in defendant's answer contained,

Plaintiff admits the allegations contained in paragraphs 1 and 11, thereof, except for the error in Exhibit 1, attached to defendant's answer and heretofore referred to.

Admits that the appraisers met at Havre, Montana, on or about the 15th day of January, 1922, and proceeded to examine the car and determine what was necessary to be supplied, and cost thereof, and total amount of damage to said car.

Denies generally each and every other allegation in said fifth [38] affirmative defense contained.

WHEREFORE, plaintiff prays for judgment according to the prayer of its complaint herein.

J. P. DONNELLY,
NOLAN & DONOVAN,
Attorneys for Plaintiff.

State of Montana,
County of Cascade,—ss.

Louis P. Donovan, being first duly sworn on oath, deposes and says: that he is one of the attorneys for the plaintiff herein, that he has read the foregoing reply, and knows the contents thereof, and that the same are true, to the best of his knowledge, information and belief.

LOUIS P. DONOVAN.

Subscribed and sworn to before me this 1st day of Sept., 1922.

[N. S.] NANCY CARROLL,
Notary Public for the State of Montana, Residing at Great Falls, Mont.

My commission expires Aug. 11, 1924. [39]

State of Montana,
County of Cascade,—ss.

Louis P. Donovan, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for plaintiff herein; that he served the foregoing reply upon George Shelton, Esquire, the attorney for defendant herein, by depositing the same in the United States Postoffice, at Great Falls, Montana, on the 1st day of September, 1922, contained in an envelope, duly addressed to the said George Shelton at his residence at Butte, Montana, with postage thereon prepaid.

LOUIS P. DONOVAN.

Subscribed and sworn to before me, this 1st day of September, A. D., 1922.

[Seal] NANCY CARROLL,
Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires August 11, 1924.

Reply. Filed Sept. 1, 1922. C. R. Garlow, Clerk. [40]

Thereafter on September 25, 1922, said cause was tried and submitted to the Court on an agreed statement of facts; and thereafter on November 11, 1922, the Court rendered its decision herein, which agreed statement of facts and decision of the Court are set forth in the defendant's bill of exceptions

herein which was duly signed, settled and allowed by the Court on November 24, 1922, and is in the words and figures following, to wit: [41]

In the District Court of the United States in and for the District of Montana.

No. 1053.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY,

Defendant.

Bill of Exceptions.

This cause having come on to be heard on the 25th of September, 1922, a trial by jury having been expressly waived in the manner required by the statutes of the United States, and the case thereupon was tried to the Court upon the following agreed statement of facts, to wit:

Agreed Statement of Facts.

"It is hereby agreed by and between the parties to the above-entitled action that the accident occurred in the following manner, to wit:

That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and

resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. [42] That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred dollars ($3,900.00) with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum.

All other defenses on the part of the defendants are abandoned.

Dated this 25th day of September, 1922."

J. P. DONNELLY,
NOLAN & DONOVAN,
Attorneys for Plaintiff.
EARLE N. GENZBERGER,
J. W. FREEMAN and
GEORGE F. SHELTON,
Attorneys for Defendant.

And it is further understood and agreed by and between the Court and counsel for the representative parties that the alleged collision occurred in Hill County, Montana, on the 18th day of July, 1921, and that the insurance policy in question and the collision clause thereof, are the printed forms of policy and collision clause prepared and used by the defendant."

And thereupon after argument of counsel, the case was submitted to the Court and thereafter on the 11th day of November, 1922, the Court rendered a decision and opinion in writing, which said opinion and decision of the Court is as follows, to wit:

Decision.

"This action for damages to plaintiff's auto insured by defendant, a New Jersey corporation, after issue joined and jury waived is tried to the Court on the following 'Agreed Statement of Facts.'"

"It is hereby agreed by and between the parties to the above-entitled action that the accident occurred in the following manner, to wit:

"That while plaintiff was driving the said automobile upon [43] the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to

cause the same to pivot and overturn and that the damage resulted therefrom; that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of $3,900 with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum.

"All other defenses on the part of the defendant are abandoned."

The policy issued in Montana and dated July 3, 1921, insures "against direct loss or damage caused . . . by the perils specifically insured against." Those perils are fire, lightning, theft, robbery, pilfering, those "while being transported in any conveyance by land or water,—stranding, sinking, collision, burning or derailment," and those within the following "collision clause."

"(Covering damage sustained in excess of $100)
(Deductible)

"In consideration of an additional premium of $50.00 this policy also covers subject to its other conditions, damage to the automobile or equipment herein described in excess of $100.00 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object, excluding (1) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble; and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile."

From the "agreed statement" it appears that the auto moving rapidly over the road, the front axle broke, and the frame dropped to the road, and the energy of forward motion resisted, caused the axle and frame to penetrate the road surface and the auto to pivot and overturn, coming into violent contact with the earth, resulting in damage to the auto as aforesaid.

The only issue is whether this occurrence was a "collision" [44] within the meaning of the "collision clause."

When this policy issued, the definition of "collision" in auto insurance was in process of development and extension beyond that popular or ordinary and to include some if not any unusual contact between auto and road or earth.

There is some conflict in court decisions, but in the courts of defendant's domicile and in some others the law was fairly settled that an occurrence like or analogous to this at bar was a "collision" within the meaning of the word in auto insurance.

See Harris vs. Co. (N. J.), 85 Atl. 194; Universal Service Co. vs. Co. (Mich.), 181 N. W. 1007. All decisions relating to the subject, extant when this policy issued are reported or referred to in 14 A. L. R. 179–212. See also Moblad vs. Co. (Cal.), 200 Pac. 764. In these cases the meaning of the word "collision" is extensively set out and so needs no repetition here. Because of this development and extension of the word's meaning, some insurance companies in policies insert express exclusions of contacts with roadbed or way, ditch or gutter, railroad ties or rails, or those contacts with the earth or other object primarily due to upsets or overturns. None of these exclusions are in this policy, but there is a limited one of "loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble" due to being in accidental collision with any other automobile, vehicle, or object.

That is, from the possible or probable meaning of "collision" defendant expressly excluded tire damage from contact with glass, tacks, or stones and other hard objects on the surface or imbedded and a part of road or earth, or from contact with ruts, depressions or other surface irregularities.

This must have been done lest otherwise these common incidents of an auto's ordinary progress

be held to be within the meaning of "collision" as used in this policy, and it is indicative that unexcluded [45] contacts with road or earth causing other than tire damage, were by the parties deemed to be within the meaning of the "collision clause" aforesaid. In view of the premises and the rules of interpretation applicable thereto, it is believed that the damage to plaintiff's auto was caused by a collision within the intent of the policy in suit.

The simplest ordinary definition of "collision" is "a striking together of two objects." The road and earth are objects. Defendant dictated this policy with the foregoing limited express exclusions, and presumptively with knowledge of the development and extension of the meaning of "collision" in the usage of auto insurance, of the conflicting court decisions including those of the courts of defendant's domicile, and of the initiated practice to insert in policies express exclusions from collisions to any extent desired by the insurer.

In these circumstances the rule is that if the policy contains words of several meanings in insurance usage, that meaning most favorable to the insured will be adopted. It is not overlooked that the word "collision" in the policy in respect to vessels and cars is used in a more restricted sense. Apparently it does not import contacts with the earth, for to include that contingency the word "stranding" is used in respect to vessels and the word "derailment" in respect to cars. But the rule that the same words are presumed to be used in the same sense, in a written instrument, yields to other

words and circumstances disclosing a different intent.

The findings are of the foregoing and for plaintiff, from which it is concluded plaintiff is entitled to recover of and from defendant in the amount set out in the agreed statement."

"Judgment accordingly."

"November 11, 1922."

"BOURQUIN,
J."

"Decision filed Nov. 11, 1922."

"C. R. GARLOW,
"Clerk." [46]

And to which decision and opinion of the Court the defendant then and there duly excepted. Now, within the time allowed by the rules of this Court, the defendant presents this its bill of exceptions and asks the Court that the same may be allowed by the Court as a true bill of exceptions and that thereupon, the same may be settled, allowed and ordered filed in the cause as a bill of exceptions therein; which is thereupon done accordingly and the same is settled and allowed as a true bill of exceptions in the case and ordered filed in the said cause as a bill of exceptions therein, this 24th day of Nov., 1922.

BOURQUIN,
Judge.

Service of the foregoing drafts of the bill of exceptions accepted and the receipt of a copy thereof acknowledged this 15th day of November, 1922.

J. P. DONNELLY,
NOLAN & DONOVAN,
Attorneys for Plaintiff.

Filed Nov. 24, 1922. C. R. Garlow, Clerk. [47]

That on the 17th day of November, 1922, judgment was duly entered herein, in the words and figures following, to wit: [48]

In the District Court of the United States in and for the District of Montana.

No. 1053.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Corporation,

Defendant.

Judgment.

This cause coming on regularly for trial on September 25, 1922, at Great Falls, Montana, the plaintiff appearing by Louis P. Donovan, Esq., and the defendant by George F. Shelton, Esq.; and the cause being submitted to the Court upon an agreed statement of facts and without a jury (a jury having been expressly waived by both parties to this action); after submission to the Court of the agreed statement of facts and the arguments of counsel, the Court on the 11th day of November, 1922, made

and filed its decision, finding in favor of the plaintiff and against the defendant for the sum of Thirty-nine Hundred ($3900.00) Dollars, with interest at the rate of eight per cent per annum from March 19, 1922, and for costs of suit.

WHEREFORE by virtue of the law and the premises it is ordered and adjudged that the said plaintiff have and recover from the defendant Four Thousand One Hundred and One and 05/100ths ($4101.05) Dollars, being the amount of principal and interest to the date of decision as aforesaid together with costs and disbursements incurred in the sum of One Hundred Twenty-six and 75/100 Dollars, together with interest on the said judgment at eight per cent per annum until paid.

Entered November 17th, 1922.

[Seal] C. R. GARLOW,
Clerk. [49]

And thereafter on December 22, 1922, a petition for a writ of error was duly filed herein, which is in the words and figures following, to wit: [50]

In the District Court of the United States for the District of Montana.

No. 1063—AT LAW.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, (a Corporation),

Defendant.

Petition for Writ of Error.

And now comes New Jersey Insurance Company, a corporation, defendant herein, and says that on or about the 17th day of November, 1922, this Court entered into judgment herein in favor of the plaintiff against defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

GEORGE F. SHELTON,
Attorney for Defendants.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [51]

Thereafter on December 22, 1922, an assignment of errors was duly filed herein, which is in the words and figures following, to wit: [52]

In the District Court of the United States for the District of Montana.

No. 1063—AT LAW.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, (a Corporation),

Defendant.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon trial of the cause, to wit:

I.

The Court erred in holding that the following facts set forth and specified in the Agreed Statement of Facts are as follows, to wit:

> "That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour and was crossing a coulee that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom, that the said damage

was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred dollars ($3,900.00) with interest thereon from the 19th day of March 1922, at the rate of 8 per cent per annum,''

constituted an accidental collision with any other automobile, vehicle or object.

II.

The Court erred in holding that under the agreed statement of facts as above set forth, that damage to plaintiff's automobile caused as specified therein was within the risks covered by the policy of insurance.

III.

The Court erred in holding that under the said Agreed Statement of Facts that the direct and proximate cause of the damage to plaintiff's automobile was a collision with the surface of the roadway

along which plaintiff was traveling and not the defective condition of the front axle whereby same broke and let the car down to the earth and plowed into same. [53]

IV.

The Court erred in ordering judgment for the plaintiff and against the defendant.

WHEREFORE the defendant prays that the judgment of the District Court may be reversed.

GEORGE F. SHELTON,
Attorney for Defendant.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [54]

Thereafter on December 22, 1922, an order allowing a writ of error was duly filed and entered herein, being in the words and figures following, to wit: [55]

In the District Court of the United States for the District of Montana.

No. 1063.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error.

This 22d day of December, 1922, came the de-

fendant, by its attorney, and filed herein and presented to the Court its petition praying for the allowance of the writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of Forty-five Hundred Dollars, which shall operate as a supersedeas bond.

BOURQUIN,
Judge.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [56]

Thereafter on December 22, 1922, a bond on writ of error was duly filed herein, being in the words and figures following, to wit: [57]

In the District Court of the United States for the District of Montana.

No. 1063.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY (a Corporation),

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that New Jersey Insurance Company, a corporation, as principal, and Aetna Casualty and Surety Company, of Hartford, Connecticut, are held and firmly bound unto the defendant in error, C. W. Young, in the full and just sum of Forty-five Hundred Dollars, to be paid to the said defendant, C. W. Young, his certain attorneys, executors, administrators, or assignes, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents. Sealed with our seals, and dated this 22d day of December, A. D. 1922.

WHEREAS, lately at a District Court of the United States for the District of Montana, in a suit depending in said court, between C. W. Young, plaintiff, and New Jersey Insurance Company, a corporation, defendant, a judgment was rendered against the said defendant, New Jersey Insurance Company, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said C. W. Young, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, in said Circuit, on the 22d day of January next.

Now, the condition of the above obligation is such, that if the said New Jersey Insurance Company

shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligations to be void; else to remain in full force and virtue.

NEW JERSEY INSURANCE COMPANY.
By GEORGE F. SHELTON,
Its Attorney.

THE AETNA CASUALTY AND SURETY COMPANY.
PAUL WOLCOTT,
Resident Vice-President.

[Seal] Attest: SIBYL G. ZOBEL,
Resident Asst. Secretary.

Approved by
BOURQUIN,
District Judge.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [58]

Thereafter, on December 22, 1922, a writ of error was duly issued herein, which original writ of error is hereto annexed and is in the words and figures following, to wit: [59]

The United States Circuit Court of Appeals for the Ninth Circuit.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between C. W. Young, plaintiff, and New Jersey Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant, New Jersey Insurance Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 22d day of Jan. next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being in-

spected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 22d day of December, A. D. 1922, and in the 146th year of the Independence of the United States of America.

Allowed by: BOURQUIN,
United States District Judge.

[Seal] Attest: C. R. GARLOW,
Clerk of the District Court of the United States, for the District of Montana.

By L. R. Polglase,
Deputy Clerk. [60]

Return to Writ of Error.

In obedience to the command of the within writ, I herewith transmit to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

By the Court.

[Seal] C. R. GARLOW,
Clerk U. S. District Court, District of Montana.
[61]

[Endorsed]: #1053. The United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Ninth Judicial Circuit,—ss. Writ of Error. Filed Dec. 23, 1922. C. R. Garlow, Clerk. [62]

Thereafter, on December 22, 1922, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [63]

The United States Circuit Court of Appeals for the Ninth Circuit.

Citation on Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.
To C. W. Young.

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 22d day of Jan. next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein New Jersey Insurance Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, District Judge of the United States, at Butte, Montana, within said circuit, this 22d day of December, in the year of our Lord one thousand

nine hundred twenty-two, of the Independence of the United States of America the one hundred and forty-sixth (146) year.

BOURQUIN,
United States District Judge.

I hereby this 22d day of December, 1922, accept due personal service of this citation on behalf of C. W. Young, defendant in error.

JOSEPH P. DONNELLY,
LOUIS P. DONOVAN,
TIMOTHY NOLAN,
Attorneys for Defendant in Error. [64]

[Endorsed]: #1053. The United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Ninth Judicial District,—ss. Citation. To C. W. Young. Filed Dec. 22, 1922. C. R. Garlow, Clerk. By L. R. Polglase, Deputy. [65]

And thereafter, on December 30, 1922, a praecipe for transcript on writ of error was duly filed herein, being the words and figures following, to wit: [66]

In the District Court of the United States in and for the District of Montana.

C. W. YOUNG,
Plaintiff,
vs.
NEW JERSEY INSURANCE COMPANY,
Defendant.

Praecipe for Transcript of Record on Writ of Error.

To the Clerk of the United States District Court for the District of Montana.

In preparing the copy of the record for transmission to the Circuit Court of Appeals for the 9th Circuit, under the writ of error sued out and the citation issued on the application of New Jersey Insurance Company, the defendant, please incorporate in the record copies of the following documents and papers, to wit: Complaint, answer, reply, bill of exceptions, judgment, petition for writ of error, assignment of errors, order allownig writ of error, writ of error, bond, citation.

GEORGE F. SHELTON,

Attorney for Plaintiff in Error and Defendant, New Jersey Insurance Company.

Copy received this 29th day of December, 1922.

J. P. DONNELLY,
L. P. DONOVAN,
TIMOTHY NOLAN,
Attorneys for Plaintiff.

Filed Dec. 30th, 1922. C. R. Garlow, Clerk. [67]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States Dis-

trict Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 67 pages, numbered consecutively from 1 to 67, inclusive, is a full, true and correct transcript of the record and proceedings has in the within entitled cause, and of the whole thereof, required to be incorporated in the record on writ of error therein by praecipe filed, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of thirty & 65/100 Dollars ($30.65), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 11th day of January, A. D. 1923.

[Seal] C. R. GARLOW,
Clerk. [68]

[Endorsed]: No. 3969. United States Circuit Court of Appeals for the Ninth Circuit. New Jersey Insurance Company, a Corporation, Plaintiff in Error, vs. C. W. Young, Defendant in Error. Transcript of Record. Upon Writ of Error to the

United States District Court of the District of Montana.

Filed January 15, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.